APPENDIX A

No. 46155

THE PEOPLE OF THE STATE OF ILLINOIS,

Appellee,

v.

LARRY GRAYSON,

Appellant.

MR. CHIEF JUSTICE UNDERWOOD delivered the opinion of the court:

Larry Grayson, the appellant here, and Donald Hall pleaded guilty on February 21, 1969, to armed robbery and were sentenced to 5 years' probation. Subsequently both were indicted for the April 9, 1970, armed robbery of Thaddeus Lukas. On July 20, the defendants were acquitted on that armed robbery charge in a bench trial. The evidence against them at that trial consisted of the testimony of the victim and the victim's brother, which the trial judge expressly found insufficient to support a finding of guilt beyond a reasonable doubt. On July 28 a petition to revoke defendants' probation was filed alleging as the only grounds therefor the commission of the Lukas robbery. The same witnesses who had testified at the earlier trial testified at the revocation hearing. A different trial judge found this evidence sufficient to hold defendants had violated their probation, their probation was revoked, and defendants were sentenced to terms of 3 to 8 years on the original armed robbery conviction. The First District Appellate Court affirmed (13 Ill. App. 3d 1049), and we granted defendant Grayson leave to appeal.

While we do not have before us the transcript of the testimony at the bench trial which resulted in the acquittal of defendants, it is not suggested that the evidence heard at the probation revocation hearing was any different from that heard at trial. We shall therefore, as did the appellate court, assume the evidence was substantially the same. The only issue apparently in dispute in both the armed robbery trial and the revocation hearing was the identity of the robbers.

We have not heretofore considered whether acquittal at a criminal trial precludes a subsequent revocation of probation predicated upon the same evidence which resulted in the earlier acquittal. Defendant urges that the judgment of acquittal in the armed robbery trial precluded the State, under the doctrines of collateral estoppel and double jeopardy, from relitigating the controlling facts of the identity of the robbers in a probation revocation hearing, while the State contends the lesser degree of proof (a preponderance of the evidence) required in the revocation hearing permits a different result.

Defendant relies on *Ashe* v. *Swenson,* 397 U.S. 436, 25 L. Ed. 2d 469, 90 S. Ct. 1189. In *Ashe,* the defendant was charged with the separate armed robberies of six participants in a poker game. Defendant went to trial before a jury on the charge of robbing one of the participants and was found not guilty. There was no question that an armed robbery had occurred and that personal property had been taken from each of the participants. The State's evidence that defendant had been one of the armed robbers, however, was weak, and the jury verdict amounted to a finding that defendant was not one of the robbers. Subsequently defendant was tried for the robbery of another participant in the poker game

and was convicted. The same witnesses who had testified at the first trial again testified but gave substantially stronger testimony on the issue of defendant's identity. The Supreme Court stated, "The single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers. And the jury by its verdict [in the first trial] found that he had not. The federal rule of law, therefore, would make a second prosecution *** wholly impermissible." 397 U.S. 436, 445, 25 L. Ed. 2d 469, 476, 90 S. Ct. 1189, 1195. The Supreme Court reversed defendant's conviction and went on to hold that the principle of collateral estoppel was embodied in the Fifth Amendment guarantee against double jeopardy, and was thus applicable to the States under *Benton* v. *Maryland,* 395 U.S. 784, 23 L. Ed. 2d 707, 89 S. Ct. 2056.

Collateral estoppel "*** stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." (*Ashe* v. *Swenson,* 397 U.S. 436, 443, 25 L. Ed. 2d 469, 475, 90 S Ct. 1189, 1194; *People* v. *Haran,* 27 Ill. 2d 229.) Defendant contends this principle was offended when he was forced to "run the gauntlet" (*Green* v. *United States,* 355 U.S. 184, 190, 2 L. Ed. 2d 199, 206, 78 S. Ct. 221) twice on the same charge, and the same issue of ultimate fact was relitigated. Defendant contends the acquittal on the charge of armed robbery amounted to a determination that he was not one of the robbers, but that the identity issue was relitigated and the same evidence used to revoke his probation.

The appellate court relied on four earlier appellate decisions that had distinguished probation revocation hearings from criminal trials on the basis of the difference in the burden of proof in each. (See *People* v. *Kuduk,* 320 Ill. App. 610; *People* v. *White,* 98 Ill. App. 2d 1; *People* v. *Whittaker,* 101 Ill App 2d 432; *People* v. *Sluder,* 107 Ill. App. 2d 177.) In a criminal trial, the State must prove the defendant guilty beyond a reasonable doubt, while in a probation revocation hearing, the probation violation need be proved only by a preponderance of the evidence. (*People* v. *Crowell,* 53 Ill. 2d 447.) The reasoning of the appellate court was that while the identification testimony may not have been sufficient to convict of armed robbery, it was sufficient to prove a probation violation by the preponderance of the evidence. The State, in its brief, distinguishes *Ashe* v. *Swenson* from this case on the basis that in *Ashe* the defendant was placed in jeopardy in two separate criminal trials for the same armed robbery, while here defendant was placed in jeopardy only once for the robbery of April 9, 1970, and then was subject to a civil proceeding where his probation was revoked. Defendant was then ordered imprisoned not for the Lukas robbery but for the offense for which he was originally granted probation. Therefore, according to the State, defendant was not twice placed in jeopardy for the same offense, nor did the doctrine of collateral estoppel apply to preclude the court at the probation revocation hearing from considering evidence of the Lukas robbery in determining whether probation should be revoked.

We note, however, that the appellate court decisions predated *Ashe* and *Benton,* and we are not persuaded that the difference in the burden of proof between a criminal trial and a probation revocation proceeding should dictate

the result in this case. While the differences between a criminal trial and a probation revocation hearing are substantial, and we see no reason to modify our determination in *People* v. *Crowell,* 53 Ill. 2d 447, that violations of conditions of probation need be proved by only a preponderance of the evidence, we believe those differences cannot fairly serve to permit relitigation of the identical issue upon the same evidence. (*People* v. *Armstrong,* 56 Ill. 2d 159.) Although proceedings may be civil in form, they may be criminal in nature (*United States* v. *United States Coin and Currency,* 401 U.S. 715, 28 L. Ed. 2d 434, 91 S. Ct. 1041), and the individual facing probation revocation may lose his liberty just as swiftly and surely as a defendant in a criminal case. We accordingly hold the principle of collateral estoppel applies in the circumstances present here. The acquittal of defendant on the charge of armed robbery was, under the evidence in this case, a determination that he was not one of the robbers. Once the ultimate and only disputed fact of identity had been determined by a final and valid judgment, the State could not constitutionally hale defendant before a new court in a criminal proceeding or a probation revocation proceeding and litigate that issue again. *Ashe* v. *Swenson,* 397 U.S. 436, 446, 25 L. Ed. 2d 469, 477, 90 S. Ct. 1189. 1195; *People* v *Joyner,* 50 Ill. 2d 302, 308.

Accordingly, the judgments of the appellate and circuit courts are reversed, and the cause is remanded to the circuit court for such further proceedings as may be consistent with this opinion.

Reversed and Remanded.

APPENDIX B

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee.

v.

LARRY GRAYSON and DONALD HALL,

Defendants-Appellants.

No. 55748

EGAN, Justice.

On February 21, 1969, both defendants pleaded guilty to armed robbery before Judge Robert J. Collins and were placed on probation for five years. In June, 1970, both were indicted for the armed robbery of Thaddeus Lukas, which took place on April 9, 1970, and were found not guilty in a bench trial before Judge Louis B. Garippo. On a hearing before Judge Collins to revoke their probation, the court heard the same identifying witnesses that had testified before Judge Garippo, revoked their probation and sentenced each to a term of three to eight years in the penitentiary. It is the position of the defendants that the finding by Judge Garippo precluded the State from relitigating the question of the robbery of Thaddeus Lukas under the doctrine of collateral estoppel.

At the revocation hearing Thaddeus Lukas testified that he was in his law office at 8801 South Commercial Avenue on April 9, 1970, when two men, he identified as the defendants, came into his office at 2:30 p.m. and robbed him. Both men struck him with their fists, and Hall with a revolver. The following day he identified Hall in a line-up, and two days later he identified Grayson in a line-up.

His brother, Edward Lukas, testified that he heard his brother screaming; and when he ran into his brother's office, he saw two men, he also identified as the defendants, beating his brother. He testified, contrary to his brother's testimony, that he saw Grayson the next day and Hall two days later.

The defendants did not testify but submitted a partial report of the proceedings before Judge Garippo, which contained no testimony but only the colloquy between the judge and lawyers and the judge's ruling. That record reflects that Judge Garippo, who had before him a motion to suppress identification, stated that the identification would not convince him beyond a reasonable doubt but that, since the line-up was satisfactorily conducted, he would deny the motion. A jury was then waived, it was stipulated that the evidence heard on the motion to suppress would be the same at the trial, and the judge found both defendants not guilty. Although we cannot tell from the report of proceedings what evidence Judge Garippo heard, since both sides have proceeded in this court on the assumption that he heard the same evidence that Judge Collins did, we shall also proceed on that assumption.

Collateral estoppel, or estoppel by verdict, was defined in Hoffman v. Hoffman, 330 Ill. 413, 417, 161 N.E. 723, 725, as follows:

> Where some controlling fact or question material to the determination of both causes has been adjudicated in the former suit by a court of competent jurisdiction and the same fact or question is again at issue between the same parties, its adjudication in the first cause will, if properly presented, be conclusive of the same question in the later suit, irrespective of the question whether the cause of action is the same in both suits or not.

It has been described as a branch of the doctrine of *res judicata.* (ILP Estoppel, § 3, page 66.) In the annotation at 9 A.L.R. 3d, page 203, the terms "res judicata" and "collateral estoppel" are used as though synonymous.

The identical question before us has been presented in a number of cases. In People v. Kuduk, 320 Ill. App. 610, 51 N.E. 2d 997, one of the grounds assigned to revoke probation was driving while intoxicated. The probationer had been found not guilty of that offense. The court, in affirming the revocation of probation, relied primarily on the differences between the burden of proof in a criminal trial and a revocation hearing and rejected the argument that the acquittal at the trial was *res judicata* at the revocation hearing. Reviewing courts have consistently followed the *Kuduk* case. In People v. White, 98 Ill. App. 2d 1, 4, 239 N.E. 2d 854, 855, the court said:

> [E]vidence is admissible on the issue of a revocation of probation for the very simple reason that proof of facts justifying revocation of probation may be established only by the greater weight of the evidence whereas evidence sufficient to convict must be proved beyond a reasonable doubt. The insufficiency of the evidence to prove the latter does not establish the insufficiency of the evidence to prove the former. * * * Evidence insufficient to warrant his conviction beyond a reasonable doubt of a violation of the criminal law may very well be evidence sufficient to establish that he had in fact violated the criminal law and to undermine, if not entirely explode, the thought that a continuation on probation will affect rehabilitation outside the penitentiary rather than in it.

The *Kuduk* case was cited in People v. Whittaker, 101 Ill. App. 2d 432, 438, 243 N.E. 2d 467, and the court rejected the same argument that is advanced here. Simi-

larly, in People v. Sluder, 107 Ill. App. 2d 177, 180, 246 N.E. 2d 35, this court held, citing *Kuduk*, "[t]hat a probation proceeding and a criminal proceeding are independent of one another and, accordingly, the result of one has no bearing on the other * * *."

All of the cases cited by the defendants are inapposite since each involves two separate criminal trials.

The judgment of the circuit court is affirmed.

Judgment affirmed.

BURKE, P. J., and GOLDBERG, J., concur.

SUPPLEMENTAL OPINION ON PETITION FOR REHEARING

EGAN, Justice.

In the Petition for Rehearing, the defendants contend that we "failed to appreciate that what was done below is prohibited by the Double Jeopardy Clause of the Fifth Amendment." We refer to the case cited by the defendants in their original brief and in the Petition for Rehearing, Ashe v. Swenson, 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469. That case held, as the defendants originally argued, that collateral estoppel is embodied in the Fifth Amendment guarantee against Double Jeopardy. (See also People v. Joyner, 50 Ill. 2d 302, 278 N.E. 2d 756.) We wish to make it clear that, when we held that the State was not collaterally estopped, we were also holding that, therefore, there had been no violation of the defendants' rights under the Fifth Amendment.

[2, 3] The defendants also contend, for the first time, that due process requires proof beyond a reasonable doubt at a revocation hearing and that, since the prosecution

seldom proceeds with revocation after an acquittal, the defendants have been discriminately prosecuted and, therefore, denied equal protection of the laws. Since these arguments were not advanced in the original hearing, they are deemed waived. Supreme Court Rule 341 (e)(7); Ill. Rev. Stat. 1971, ch. 110A, § 341 (e)(7); Sobina v. Busby, 62 Ill. App. 2d 1, 210 N.E. 2d 769.

Moreover, in People v. Crowell, 53 Ill 2d 447, 450-451, 292 N.E. 2d 721, the Supreme Court held that a violation of the conditions of probation need be proved only by a preponderance of the evidence. We further find no merit in the defendants' contention that they were denied equal protection of the laws.

We adhere to our original opinion, and the defendants' Petition for Rehearing is denied.

BURKE, P. J., and GOLDBERG, J., concur.